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GAPS IN THE ENDANGERED SPECIES ACT: THE PLIGHT OF THE FLORIDA PANTHER

JESSICA ALFANO*

Abstract: In 2009 several environmental groups petitioned the U.S. Fish and Wildlife Service to initiate rulemaking to designate critical habitat for the Florida panther. In *Conservancy of Southwest Florida v. U.S. Fish & Wildlife Service*, the Eleventh Circuit upheld the FWS's decision. The appellate decision hinged largely on language in the Endangered Species Act that grants discretion to an agency in deciding whether to designate critical habitat for a species listed as endangered prior to the 1978 amendments to that Act. This Comment argues that the language relied upon by the court creates an arbitrary timestamp under which species with similar protection needs have substantially dissimilar rights to such protection. Because this Eleventh Circuit interpretation of the Act's language is sound, a change in the Act's language is necessary to afford all endangered species the same protection.

INTRODUCTION

Florida's state animal is the panther, a tawny colored, seven-foot long wildcat.¹ These solitary animals hunt a wide array of prey including white-tailed deer, raccoon, and armadillo.² They live in dry habitats, ideally land at the border between wetlands and woodlands, and require large, sprawling territories in which to hunt and reproduce.³ Although Florida panthers were once found across the southeastern United States, as far north and west as Tennessee and Arkansas, at most 160 remaining panthers now live exclusively in the southern tip of Florida.⁴ Habitat loss is the most significant threat to the panther's recovery.⁵

* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2012–2013.

¹ *Basic Facts About the Florida Panther*, DEFENDERS OF WILDLIFE, <http://www.defenders.org/florida-panther/basic-facts> (last visited Jan. 18, 2013).

² *Id.*

³ U.S. FISH & WILDLIFE SERV., FLORIDA PANTHER RECOVERY PLAN, at viii (2008), available at http://ecos.fws.gov/docs/recovery_plan/081218.pdf; *Exploring the Environment: Florida Everglades*, CENTER FOR EDUC. TECHS., <http://www.cotf.edu/etc/modules/everglades/FEpanther.html> (last visited Jan. 18, 2013).

⁴ *Basic Facts About the Florida Panther*, *supra* note 1.

⁵ U.S. FISH & WILDLIFE SERV., *supra* note 3, at ix.

In 1967, the United States Fish and Wildlife Service (FWS) listed the Florida panther as an endangered species under the Endangered Species Protection Act (ESPA).⁶ In the nearly fifty years that the Florida panther has remained on the endangered species list, its numbers have increased modestly from approximately twenty panthers in the 1970s to an estimated maximum of 120 in 2007.⁷ Even with this growth, the number of panthers remains at a point so low that the possibility of recovery is substantially impaired and the FWS predicts the panther may likely be extinct within forty years.⁸ Despite this, no territory has been allocated to the protection and preservation of the Florida panther.⁹

In contrast, in 1979, twelve years after listing the Florida panther, the FWS added the Virginia big-eared bat to the endangered species list under the Endangered Species Act (ESA), which replaced the ESPA.¹⁰ This species, a medium sized bat with long ears and distinctive facial glands, had declined to a population of fewer than three thousand.¹¹ At the time of listing, the FWS designated five caves in West Virginia as protected habitat.¹² Since its endangered listing and the resulting protection of its habitat, the Virginia big-eared bat's population has grown to nearly twenty thousand bats in 2007.¹³ Recognizing the impact that

⁶ Endangered Species, 32 Fed. Reg. 4001, 4001 (Mar. 11, 1967); *Species Profile: Florida Panther (Puma Concolor Coryi)*, U.S. FISH & WILDLIFE SERVICE, <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=A008> (last visited Jan. 18, 2013); see Endangered Species Preservation Act, 16 U.S.C. §§ 668aa–cc-6 (1970), *repealed by* Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1534 (2006).

⁷ U.S. FISH & WILDLIFE SERV., *supra* note 3, at viii; see Endangered Species, 32 Fed. Reg. at 4001.

⁸ *Puma Concolor Coryi*, NATURESERVE EXPLORER (last updated Oct. 2012), <http://www.natureserve.org/explorer/servlet/NatureServe?searchName=Puma+concolor+coryi>; see U.S. FISH & WILDLIFE SERV., *supra* note 3, at viii. Threats to recovery result from impacts on the panther's current habitat, including logging, oil field activity, housing development, car collisions, and deer hunting. *Puma concolor coryi*, *supra*.

⁹ *Species Profile: Florida Panther*, *supra* note 6; see *Puma Concolor Coryi*, *supra* note 8.

¹⁰ Endangered and Threatened Wildlife and Plants: Listing of the Virginia and Ozark Big-Eared Bats as Endangered Species, and Critical Habitat Determination, 44 Fed. Reg. 69,206, 69,206 (Nov. 30, 1979) (codified at 50 C.F.R. pt. 17); see 16 U.S.C. §§ 668aa–cc-6; Endangered Species, 32 Fed. Reg. at 4001.

¹¹ Proposed Endangered Listing and Critical Habitat Determination for the Virginia and Ozark Big-Eared Bats, 42 Fed. Reg. 61,290, 61,291 (Dec. 2, 1977) (codified at 50 C.F.R. pt. 17); *Species Profile: Virginia Big-Eared Bat (Corynorhinus Townsendii Virginianus)*, U.S. FISH & WILDLIFE SERVICE, <http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?spcode=A080> (last visited Jan. 18, 2013).

¹² Endangered and Threatened Wildlife and Plants: Listing of the Virginia and Ozark Big-Eared Bats as Endangered Species, and Critical Habitat Determination, 44 Fed. Reg. at 69,206, 69,207.

¹³ VIRGINIA BIG-EARED BAT 5-YEAR REVIEW 6 (2008), *available at* http://ecos.fws.gov/docs/five_year_review/doc1963.pdf.

protection of these caves had for the bats, the FWS recommended that they remain listed as endangered and therefore continue to receive habitat protection.¹⁴

The treatment of these two species, listed a mere twelve years apart, includes a key difference.¹⁵ Under the 1978 amendment to the ESA, a critical habitat must be designated at the time a species is listed as endangered or threatened.¹⁶ Thus, upon designation as an endangered species, the Virginia big-eared bat was assigned a territory, which is recognized as essential to its conservation and which would receive continual protection from disruption.¹⁷ The ESA contains no critical habitat designation requirement, however, for species listed prior to the 1978 Amendments, such as the Florida panther.¹⁸ Thus, because of an arbitrary timestamp on a species' placement on the endangered species list, critical protection measures can be denied.¹⁹

This lack of protection is the central issue in *Conservancy of Southwest Florida v. U.S. Fish & Wildlife Service*, a case in which several environmental organizations petitioned the FWS to initiate rulemaking for the designation of a critical habitat for the Florida panther.²⁰ After the FWS denied their petition, these advocates filed suit under the Administrative Procedure Act (APA) and the ESA, seeking an order requiring the FWS to initiate rulemaking ensuring the preservation of the panther.²¹

The Eleventh Circuit affirmed the district court dismissal of the plaintiffs' lawsuit, holding that the FWS has discretion in deciding whether to initiate rulemaking to designate critical habitat.²² This rendered such rulemaking decisions unreviewable by the court and left the

¹⁴ See *id.* at 16–17 (“The recovery potential is considered to be relatively high, based on our known ability to prevent disturbance in the caves . . .”).

¹⁵ Compare Endangered Species, 32 Fed. Reg. 4001, 4001 (Mar. 11, 1967) (not containing a critical habitat designation), with Endangered and Threatened Wildlife and Plants: Listing of the Virginia and Ozark Big-Eared Bats as Endangered Species, and Critical Habitat Determination, 44 Fed. Reg. at 69,206 (containing a critical habitat designation).

¹⁶ Endangered Species Act Amendments of 1978 § 11(1), Pub. L. No. 95-632, § 11(1), 92 Stat. 3751, 3764 (codified as amended at 16 U.S.C. § 1533(a)(3)(A)(i) (2006)).

¹⁷ Endangered and Threatened Wildlife and Plants: Listing of the Virginia and Ozark Big-Eared Bats as Endangered Species, and Critical Habitat Determination, 44 Fed. Reg. at 69,206, 69,207 (Nov. 30, 1979) (codified at 50 C.F.R. pt. 17).

¹⁸ Endangered Species Act of 1973 § 11(1), 16 U.S.C. § 1532(5)(B) (2006).

¹⁹ See Endangered Species Act Amendments of 1978 § 11(1).

²⁰ *Id.* The petitioning organizations included the Conservancy of Southwest Florida, the Sierra Club and the Center for Biological Diversity. *Conservancy of Sw. Fla. v. U.S. Fish & Wildlife Serv.*, 677 F.3d 1073, 1076 (11th Cir. 2012).

²¹ *Conservancy of Sw. Fla.*, 677 F.3d at 1077–78.

²² *Id.* at 1085.

remaining Florida panthers without a designated critical habitat.²³ This Comment argues that, though the legal reasoning of the Eleventh Circuit was sound, the FWS should still be required to designate a critical habitat for the Florida panther.²⁴ The statutory structure should be reformed because the gap left by not requiring a critical habitat designation for species listed prior to the 1978 Amendment to the ESA permits arbitrary treatment of species that need protection.²⁵

I. FACTS AND PROCEDURAL HISTORY

During the nearly fifty years the Florida panther has been listed as endangered, its habitat has declined to only five percent of its historical range.²⁶ In 2009, the Florida panther still had not been designated a critical habitat and only approximately 120 wild panthers remained.²⁷ On January 21, 2009, in the hopes of securing further protection for the panthers and aiding their recovery, the Conservancy of Southwest Florida ("Conservancy") filed a petition with the FWS to initiate rule-making for the designation of a critical habitat.²⁸ The Center for Biological Diversity ("Center") offered additional support to the Conservancy's cause on September 17, 2009, when it, in conjunction with other advocacy groups, also submitted a petition.²⁹

In their petitions, the advocacy groups referred to scientific studies regarding fragmentation and degradation of the Florida panther's habitat and the ways in which such degradation led to the decline of the panther population.³⁰ These studies demonstrated that, because of its hunting and breeding requirements, a male panther needs a home

²³ *Id.*

²⁴ See *infra* notes 104–119 and accompanying text.

²⁵ See *infra* notes 104–119 and accompanying text.

²⁶ U.S. FISH & WILDLIFE SERV., *supra* note 3, at viii; see Endangered Species, 32 Fed. Reg. 4001, 4001 (Mar. 11, 1967).

²⁷ *Conservancy of Sw. Fla.*, 677 F.3d at 1076; *Species Profile: Florida Panther*, *supra* note 6.

²⁸ *Conservancy of Sw. Fla.*, 677 F.3d at 1076; see *Help Protect the Florida Panther*, CONSERVANCY OF SW. FLA., <http://www.conservancy.org/page.aspx?pid=739> (last visited Jan. 18, 2013). Other environmental advocacy groups, including the Sierra Club joined the Conservancy on July 23, 2009, by submitting petitions to the FWS seeking a similar designation. *Conservancy of Sw. Fla.*, 677 F.3d at 1076.

²⁹ *Conservancy of Sw. Fla.*, 677 F.3d at 1076; CENTER FOR BIOLOGICAL DIVERSITY, PETITION FOR RULE-MAKING: REINTRODUCTION OF THE ENDANGERED FLORIDA PANTHER 4 (2010), available at http://www.biologicaldiversity.org/species/mammals/Florida_panther/pdfs/Florida-panther-petition-Okefenokee.pdf. On November 19, 2009, the Sierra Club supplemented its original petition with information regarding the effect of climate change on the Florida panther's recovery. *Conservancy of Sw. Fla.*, 677 F.3d at 1076–77.

³⁰ *Conservancy of Sw. Fla.*, 677 F.3d at 1076; CENTER FOR BIOLOGICAL DIVERSITY, *supra* note 29, at 31–36.

range up to 250 square miles, and female panthers need up to 150 square miles.³¹ The petitioners contended that this need, combined with the panther's diminishing habitat, posed a threat to the panthers' recovery, and they therefore requested action by the FWS.³²

The FWS declined to initiate rulemaking.³³ On February 11, 2010, the FWS sent letters to the Conservancy, the Center, and the Sierra Club, explaining its rationale for denying the petitions.³⁴ In its letters the FWS cited the measures already in place to conserve the panther's habitat, such as efforts to identify areas for possible reintroduction of a panther population; security, maintenance, and restoration initiatives for those areas; and advocacy to raise public awareness about panthers.³⁵ The FWS contended that these actions alone were adequate to protect the panthers, thereby rendering designation of critical habitat unnecessary.³⁶

Seven days after receiving the letters, the petitioning parties filed suit in the United States District Court for the Middle District of Florida.³⁷ The complaint set forth claims under the citizen-suit provision of the ESA and alleged violations of the APA.³⁸ The plaintiffs contended that, in denying their request, the FWS acted arbitrarily and capriciously under the APA.³⁹ They supported this contention with claims that the FWS's decision failed to address the scientific evidence presented and that the FWS ignored the potential effects climate change could have on the panther's current habitat.⁴⁰ Additionally, they argued that the FWS, having focused on the current preservation efforts for the panther in lieu of addressing the science presented by the petitions, failed to rationally explain its decision.⁴¹ Finally, plaintiffs asserted violations of certain regulations and statutes that allegedly re-

³¹ *Conservancy of Sw. Fla.*, 677 F.3d at 1076.

³² *Id.* at 1076–77.

³³ *Id.* at 1077.

³⁴ *Id.*

³⁵ *Id.*; U.S. FISH & WILDLIFE SERV., *supra* note 3, at xiii.

³⁶ *Conservancy of Sw. Fla.*, 677 F.3d at 1077.

³⁷ *Id.* The petitioners named the FWS, the Director of the FWS in his official capacity, the U.S. Department of the Interior and the Secretary of the Interior in his official capacity, as defendants *Id.* The Seminole Tribe and Eastern Collier Property Owners intervened as defendants because of their status as owners and developers of the land the plaintiffs requested the FWS designate as critical habitat. *Id.*; see FED. R. CIV. P. 24.

³⁸ *Conservancy of Sw. Fla.*, 677 F.3d at 1077; see Administrative Procedure Act § 551, 5 U.S.C. § 551 (2006).

³⁹ *Conservancy of Sw. Fla.*, 677 F.3d at 1077; see 5 U.S.C. § 706(2) (A).

⁴⁰ *Conservancy of Sw. Fla.*, 677 F.3d at 1077.

⁴¹ *Id.*

quired the FWS to consider specific factors, including reliance on the best scientific data, in responding to petitions.⁴²

Defendants moved to dismiss plaintiffs' complaint, arguing in part that FWS's decision was committed to agency discretion by law and therefore was unreviewable under the APA.⁴³ The district court concluded that, among other issues, the plaintiffs' claim failed to allege any statutory provision or regulation that applied to the decision regarding whether to designate critical habitat.⁴⁴ Without an applicable statutory standard against which to judge the FWS's actions, the court held that the decision of whether to designate critical habitat was committed to FWS's discretion, making it unreviewable under the APA.⁴⁵ The case was therefore dismissed and the plaintiffs filed an appeal with the Eleventh Circuit Court of Appeals.⁴⁶

II. LEGAL BACKGROUND

A. *The Endangered Species Act and Critical Habitat*

In 1973, Congress enacted the ESA with the purpose of providing "a program for the conservation of . . . endangered species and threatened species."⁴⁷ The ESA gave the Secretary of the Interior ("Secretary") authority to determine whether a species should be listed as endangered or threatened.⁴⁸ Consequently, the Secretary may initiate protective measures for a listed species to prevent the potential widespread extinction that may result from society's continued economic growth and development.⁴⁹ Such measures include prohibitions on actions agencies take relative to that species; organization at the state, federal, and international levels for the continued protection of the

⁴² *Id.* at 1077–78. The plaintiffs relied on the regulations and the statute. *Id.*; see Endangered Species Act of 1973, § 4(b)(2), 16 U.S.C. § 1533(b)(2) (2006); Joint Regulations on Endangered Species, 50 C.F.R. §§ 424.12(a)–(b) (2011).

⁴³ *Conservancy of Sw. Fla.*, 677 F.3d at 1078; see 5 U.S.C. § 701(a)(2); FED. R. CIV. PRO. 12(b)(1).

⁴⁴ *Conservancy of Sw. Fla.*, 677 F.3d at 1078. The other issue presented to the district court concerned plaintiffs' Article III constitutional standing to bring the suit. *Id.* The court concluded that the plaintiffs did have the necessary standing and this issue was not raised again on appeal. *Id.*

⁴⁵ *Id.*; see Administrative Procedure Act § 701(a)(2), 5 U.S.C. § 701(a)(2) (2006).

⁴⁶ *Conservancy of Sw. Fla.*, 677 F.3d at 1078.

⁴⁷ Pub. L. 93-205, § 2(b) 87 Stat. 884, 885 (1973) (codified as amended at 16 U.S.C. §§ 1531–1544, § 1531(b) (2006)).

⁴⁸ Endangered Species Act of 1973 § 4(a)(1), 16 U.S.C. § 1533(a)(1) (2006).

⁴⁹ See *id.* § 1531(a)–(b).

species; and importantly, the ability to designate critical habitat for such a species.⁵⁰

Congress amended the ESA in 1978 to require that a proposal for listing a species as threatened or endangered specify a critical habitat.⁵¹ Thus, all additional species protected under the ESA from 1978 forward are designated a critical habitat.⁵² The 1978 Amendments also specified that this new requirement “shall not apply with respect to any species which was listed prior to enactment of the [Amendments]” but, for such species, critical habitat “*may* be established.”⁵³ The permissive approach to designation of critical habitat for pre-1978 species remains in force.⁵⁴

Designation of a critical habitat ensures that a habitat is neither destroyed nor adversely modified by a federal agency and that agencies do not act in such a way as to jeopardize the continued existence of a species.⁵⁵ In its original form, the ESA provided no guidance as to how the Secretary should determine whether a critical habitat was necessary.⁵⁶ Currently, however, when an agency chooses to initiate rulemaking to designate critical habitat, the ESA and accompanying regulations set forth a standard.⁵⁷

In *Tennessee Valley Authority v. Hill*, the Supreme Court held that Congress’s intent in enacting the ESA was to make the preservation of species a national priority with the knowledge that the most significant threat to imperiled species was the destruction of natural habitats.⁵⁸

⁵⁰ See *id.* §§ 1535–1538.

⁵¹ Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11(1), 92 Stat. 3751, 3764 (codified as amended at 16 U.S.C. §§ 1531–1544, § 1533(b)(2) (2006)).

⁵² 16 U.S.C. § 1533(b)(2).

⁵³ Endangered Species Act Amendments of 1978 § 11(1) (emphasis added). The ESA currently states, “Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established.” Endangered Species Act of 1973 § 2(B), 16 U.S.C. § 1532(5)(B).

⁵⁴ Endangered Species Act of 1973 § 2(B), 16 U.S.C. § 1532(5)(B) (2006).

⁵⁵ *Id.* § 1536(a)(2).

⁵⁶ *Ala. Tombigbee Rivers Coal v. Kempthorne*, 477 F.3d 1250, 1264 (11th Cir. 2007).

⁵⁷ 16 U.S.C. § 1533(b)(2); Joint Regulations on Endangered Species, 50 C.F.R. § 424.12 (2011). Under the ESA, the Secretary is required to base his decision regarding critical habitat designation on the “best scientific data available.” 16 U.S.C. § 1533(b)(2). Additionally, the regulations articulate factors for determining which areas are considered a species’ critical habitat, such as space, food, water, shelter, breeding and disturbance characteristics of a region. 50 C.F.R. § 424.12(b). Additionally, the regulations require that “[a] final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the probable economic and other impacts of making such a designation” 50 C.F.R. § 424.12(a).

⁵⁸ 437 U.S. 153, 176, 179 (1978).

With that understanding, Congress crafted a statute with exceedingly clear language commanding federal agencies to “insure” that the preservation of listed species is paramount.⁵⁹ In *Middle Rio Grande Conservancy District. v. Babbitt*, the District Court for the District of New Mexico found the designation of critical habitat to be a “key protection” meant to bring listed species “back from the brink of extinction.”⁶⁰ That court stated that the designation of a critical habitat is a “principal means” for the conservation of a species because it is essential to protect both the species and its ecosystem.⁶¹

B. Agency Discretion and Review

Because the Secretary is charged with administering the provisions of the ESA, review of proceedings pursuant to the ESA can only be made under the guidelines of the Administrative Procedure Act (APA).⁶² Section 706(2) (A) of the APA allows federal courts to review and overturn the Secretary’s actions if the court determined the actions are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁶³ The Eleventh Circuit has interpreted this language to provide an “exceedingly deferential” standard.⁶⁴

Furthermore, a court cannot even conduct an inquiry into agency actions that are “committed to agency discretion by law.”⁶⁵ The Supreme Court has found that the APA precludes judicial review of agency actions only in very narrow circumstances.⁶⁶ There are, however, several cases in the Eleventh Circuit in which the court has concluded that section 701(a) (2) of the APA renders agency action taken pursuant to permissive statutory language unreviewable by courts.⁶⁷ In

⁵⁹ *Id.* at 173; see Endangered Species Act of 1973 § 7, 16 U.S.C. § 1536(a) (2006).

⁶⁰ 206 F. Supp. 2d 1156, 1169 (D.N.M. 2000).

⁶¹ *Id.*

⁶² Administrative Procedure Act § 551, 5 U.S.C. § 551 (2006); see 16 U.S.C. § 1533(a) (1).

⁶³ 5 U.S.C. § 706(2) (A).

⁶⁴ *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996); *N. Buckhead Civic Ass’n v. Skinner*, 903 F.2d 1533, 1539 (11th Cir. 1990); *Sierra Club v. Van Antwerp* 526 F.3d 1353, 1360 (11th Cir. 2008).

⁶⁵ 5 U.S.C. § 701(a) (2).

⁶⁶ *Citizens to Preserve Overton Park v. Volpe*, 401, U.S. 402, 410 (1971) (holding that under the APA, the exception of non-reviewability of agency action committed to agency discretion is a “very narrow exception”).

⁶⁷ See *Lenis v. U.S. Attorney Gen.*, 525 F.3d 1291, 1293–94 (11th Cir. 2008) (ruling that in the absence of any statute or regulation which provided a standard to limit the Board of Immigration Appeals’ decision regarding re-opening a case, such a decision was unreviewable); *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1508 (11th Cir. 1992) (ruling that the Immigration and Naturalization Service’s procedures for identifying refugees were

Greenwood Utilities Commission v. Hodel, the Eleventh Circuit found judicial review appropriate only when a statute provides a reviewing court with specific law to apply.⁶⁸ That court held that decisions committed to an agency by law without statutorily constructed standards are not reviewable, even for abuse of discretion.⁶⁹

In addition to the Eleventh Circuit, other circuits have specifically examined the issue of critical habitat designation for species listed prior to the 1978 Amendments to the ESA.⁷⁰ In *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, the Ninth Circuit reviewed a case factually similar to the instant one.⁷¹ In that case, the Center for Biological Diversity sued the U.S. Fish and Wildlife Service (FWS), contending that it violated the ESA by its failure to designate critical habitat for the unarmored threespine stickleback fish.⁷² The FWS listed the stickleback as endangered under the ESA in 1970.⁷³ Twenty years later, when a construction company executed a mining contract threatening the stickleback's habitat, the FWS still had not designated, and declined to designate, critical habitat for the fish.⁷⁴ The Ninth Circuit held that the FWS's actions were reviewable but were not arbitrary or capricious because the FWS "considered the relevant factors and articulated a rational connection between the facts found and the choice made."⁷⁵ Although the court allowed review of the agency decision, it ultimately held that species listed as endangered prior to the 1978 Amendment could remain without critical habitat designation.⁷⁶

Similarly, in *Fund for Animals v. Babbitt*, the District Court for the District of Columbia found FWS's action reviewable but deferred to the agency's decision declining to initiate rulemaking for the designation of a critical habitat for the grizzly bear.⁷⁷ Under the arbitrary and capricious standard, the district court held that an agency's decision not to

unreviewable due to the lack any of statute, regulation, or treaty limiting the agency's discretion); *Greenwood Utils. Comm'n v. Hodel*, 764 F.2d 1459, 1464 (11th Cir. 1985) (ruling that agency action is unreviewable when there are no standards against which a court can measure the lawfulness of the action).

⁶⁸ 764 F.2d at 1464.

⁶⁹ *Id.*

⁷⁰ See *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 933 (9th Cir. 2006); *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 115–17 (D.C. 1995).

⁷¹ See *Ctr. for Biological Diversity*, 450 F.3d at 933.

⁷² *Id.* at 933–34.

⁷³ *Id.* at 932–33.

⁷⁴ *Id.* at 933–34.

⁷⁵ *Id.* at 937, 938–39.

⁷⁶ See *id.*

⁷⁷ 903 F. Supp. 96 at 115–16.

initiate rulemaking would be overturned “only in the rarest and most compelling of circumstances.”⁷⁸

III. ANALYSIS

The Court of Appeals for the Eleventh Circuit held that the U.S. Fish and Wildlife Service’s (FWS) denial of a petition to initiate rulemaking to designate critical habitat for the Florida panther was committed to agency discretion by law, pursuant to the Administrative Procedure Act (APA), and therefore not subject to judicial review.⁷⁹ Because the Florida panther was listed as endangered prior to the 1978 Amendments to the ESA, the FWS was not required to designate a critical habitat for it.⁸⁰ The Eleventh Circuit also held that neither the ESA nor any of the regulations the plaintiffs cited set forth a meaningful standard for a court to use in evaluating the FWS’s decision not to designate critical habitat for this species.⁸¹

The court reasoned that review of the FWS’s decision was precluded by section 701(a)(2) of the APA, which bars judicial review of agency actions under statutes lacking any standard “against which to judge the agency’s exercise of discretion.”⁸² The court rejected the applicability of the various regulations and statutory provisions that the plaintiffs had argued established a framework against which a court could determine that the FWS had abused its discretion.⁸³ The court explained that these provisions guide an agency in deciding *what* to designate as critical habitat but not in *whether* such a designation is necessary.⁸⁴ It then reasoned that each of these provisions presupposes that a critical habitat would be designated and then offers guidelines for precisely what would be designated.⁸⁵ Therefore, the court held that

⁷⁸ *Id.* at 116.

⁷⁹ *Conservancy of Sw. Fla. v. U.S. Fish & Wildlife Serv.*, 677 F.3d 1073, 1082, 1085 (11th Cir. 2012); *see* Administrative Procedure Act § 701(a)(2), 5 U.S.C. § 701(a)(2) (2006).

⁸⁰ *See Conservancy of Sw. Fla.*, 677 F.3d at 1076, 1083.

⁸¹ *Id.* at 1082.

⁸² *Id.* (citing *Lenis v. U.S. Attorney Gen.*, 525 F.3d 1291, 1293–94 (11th Cir. 2008)); *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1508 (11th Cir. 1992); *Greenwood Utils. Comm’n v. Hodel*, 764 F.2d 1459, 1464 (11th Cir. 1985); *see* 5 U.S.C. § 701(a)(2).

⁸³ *Conservancy of Sw. Fla.*, 677 F.3d at 1078–79; *see supra* note 57 and accompanying text.

⁸⁴ *Conservancy of Sw. Fla.*, 677 F.3d at 1079–81; *see* Endangered Species Act of 1973 § 4(b)(2), 16 U.S.C. § 1533(b)(2) (2006); Joint Regulations on Endangered Species, 50 C.F.R. § 424.12 (2011).

⁸⁵ *Conservancy of Sw. Fla.*, 677 F.3d at 1079–81.

the decision of *whether* to designate critical habitat was committed to agency discretion by law, making it unreviewable under the APA.⁸⁶

The permissive language of the current version of the ESA regarding the designation of critical habitat for those species listed prior to the Amendments justifies the Eleventh Circuit's reasoning in this case.⁸⁷ Under these Amendments, a species *shall* be designated a critical habitat upon being listed as endangered or threatened from that point forward,⁸⁸ but only *may* be designated a critical habitat if the species is already listed.⁸⁹ As the Eleventh Circuit recognized, Congress's word choice in this section grants the FWS discretion in deciding whether to designate critical habitat for those species listed prior to 1978.⁹⁰

The Eleventh Circuit is not the only court to rule that the FWS is not required to designate critical habitat for such species.⁹¹ The Ninth Circuit and the District Court for the District of Columbia have also held that the FWS has discretion regarding whether to designate critical habitat.⁹² In contrast to the instant case, however, both of those courts found the agency's action reviewable under the APA's "arbitrary and capricious" standard.⁹³ Nonetheless, both the Ninth Circuit and the District Court for the District of Columbia, after inquiring into the FWS's decision-making, held that the agency's decision not to initiate rulemaking to designate critical habitat was not arbitrary and capricious.⁹⁴ Consequently, the Florida panther, the unarmored threespine stickleback fish, and the grizzly bear all lack a critical habitat because of the FWS's discretionary decisions.⁹⁵

These cases do not demonstrate a widespread misinterpretation of the ESA by the courts.⁹⁶ Nor do they display a misunderstanding of the

⁸⁶ *Id.* at 1082.; see Administrative Procedure Act § 701(a)(2), 5 U.S.C. § 701(a)(2) (2006).

⁸⁷ 16 U.S.C. § 1532(5)(B); see *Conservancy of Sw. Fla.*, 677 F.3d at 1083.

⁸⁸ 16 U.S.C. § 1533(a)(3)(A)(i).

⁸⁹ 16 U.S.C. § 1532(5)(B).

⁹⁰ See *Conservancy of Sw. Fla.*, 677 F.3d at 1084.

⁹¹ See *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 939 (9th Cir. 2006); *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 116 (D.C. 1995).

⁹² *Ctr. for Biological Diversity*, 450 F.3d at 939; *Fund for Animals v. Babbitt*, 903 F. Supp. at 116.

⁹³ *Ctr. for Biological Diversity*, 450 F.3d at 937; *Fund for Animals v. Babbitt*, 903 F. Supp. at 105, 116.

⁹⁴ *Ctr. for Biological Diversity*, 450 F.3d at 938–39; *Fund for Animals v. Babbitt*, 903 F. Supp. at 117.

⁹⁵ See *Conservancy of Sw. Fla.*, 677 F.3d at 1074; *Ctr. for Biological Diversity*, 450 F.3d at 939; *Fund for Animals v. Babbitt*, 903 F. Supp. at 116.

⁹⁶ See *supra* notes 79–90, 92–94 and accompanying text.

provisions regarding reviewability of agency decisions under the APA.⁹⁷ They are based on sound logic and effortful reasoning.⁹⁸ The courts' decisions, however, evidence a significant and unsupportable gap in the current statutory protection for endangered and threatened species.⁹⁹

Courts have recognized the designation of critical habitat as being of central importance to achieving the purpose of the ESA.¹⁰⁰ In *Middle Rio Grande Conservancy District v. Babbitt*, the New Mexico district court referred to the ESA's critical habitat provisions as the "principal means for conserving an endangered species."¹⁰¹ Such language demonstrates the understanding that protecting a species' ecosystem is a necessary step to preserving endangered species.¹⁰² Moreover, the Supreme Court, in *Tennessee Valley Authority v. Hill*, recognized that the ESA's provisions impose serious requirements of cooperation from federal agencies in order to uphold the "national policy of saving endangered species."¹⁰³

Despite courts recognizing the importance of a critical habitat, the current statutory structure allows key protection measures to hinge on a chance timestamp rather than a legitimate need for protection.¹⁰⁴ At the time of the enactment of the 1978 Amendments to the ESA, 180 species listed as endangered or threatened did not have a critical habitat designated.¹⁰⁵ With regard for their need for federal protection, nothing substantial differentiated these species from those which would be listed in the future.¹⁰⁶ Congress and federal agencies, however,

⁹⁷ See *supra* notes 79–90, 92–94 and accompanying text.

⁹⁸ See *supra* notes 79–90, 92–94 and accompanying text.

⁹⁹ See *Conservancy of Sw. Fla.*, 677 F.3d at 1074; *Ctr. for Biological Diversity*, 450 F.3d at 939; *Fund for Animals v. Babbitt*, 903 F. Supp. at 116.

¹⁰⁰ See Endangered Species Act of 1973 § 2(b), 16 U.S.C. § 1531(b) (2006); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 176, 173 (1978); *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1169 (D.N.M. 2000).

¹⁰¹ 206 F. Supp. 2d at 1169.

¹⁰² *Id.*

¹⁰³ 437 U.S. at 184–85; see 16 U.S.C. §§ 1531(c), 1536.

¹⁰⁴ David A. Paulson, *No Endangered Species Left Behind: Correcting the Inequity in Critical Habitat Designation for Pre-1978-Amendment Listed Species*, 25 U. HAW. L. REV. 525, 527–28 (2003); see *Tenn. Valley Auth.*, 437 U.S. at 184–85; *Middle Rio Grande Conservancy Dist.*, 206 F. Supp. 2d at 1169.

¹⁰⁵ Paulson, *supra* note 104, at 528.

¹⁰⁶ See *id.* Compare Endangered and Threatened Wildlife and Plants: Listing of the Virginia and Ozark Big-Eared Bats as Endangered Species, and Critical Habitat Determination, 44 Fed. Reg. 69,206, 69,207 (Nov. 30, 1979) (codified at 50 C.F.R. pt. 17) (listing the Virginia big-eared bats as endangered due to "the threatened destruction, modification, or curtailment of its habitat or range"), with U.S. FISH & WILDLIFE SERV., *supra* note 3, at viii–ix (retaining the Florida panther's endangered status due to "habitat loss, degradation, and fragmentation").

would have faced a heavy burden of designating critical habitat for 180 species of plant and wildlife at once.¹⁰⁷ Rather than impose such a substantial burden, Congress left this task to the Department of the Interior, permitting it to undertake the chore at its discretion.¹⁰⁸ The illogical nature of this scheme is readily apparent when considering that the species listed the earliest—those that caused Congress to initiate action—are not afforded the full protection of the ESA.¹⁰⁹ Furthermore, this difference in treatment cannot be reconciled with court opinions that express the crucial need for a critical habitat designation.¹¹⁰

The ESA should be revised to require designation of critical habitat for all species on the endangered or threatened species lists.¹¹¹ Because the ESA's language regarding designation of critical habitat for species listed prior to the 1978 Amendments is currently unambiguously permissive, courts will continue to uphold agency decisions that decline to initiate rulemaking to designate critical habitat.¹¹² The ESA's purpose, however, is to provide protection to those species whose numbers have declined so severely as to make their continued existence a significant concern.¹¹³ One of the most significant measures for remedying this threat entails conserving the ecosystem vital to the species' survival.¹¹⁴ Without such protection, other measures undertaken to preserve the species may be unable to fulfill Congress's intention in enacting the statute.¹¹⁵

Fortunately, remedying this problem will not be difficult.¹¹⁶ The ESA already provides a framework for evaluating and assigning critical habitat.¹¹⁷ Because all species now being considered for the endangered species list must be designated critical habitat, the same structure that

¹⁰⁷ Paulson, *supra* note 104, at 528.

¹⁰⁸ See Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11(1), 92 Stat. 3751, 3764 (codified as amended at 16 U.S.C. § 1532(5)(B) (2006)).

¹⁰⁹ See Endangered Species Act of 1973 § 2(a), 16 U.S.C. § 1531(a) (2006); Paulson, *supra* note 104, at 526.

¹¹⁰ See, e.g., *Middle Rio Grande Conservancy Dist.*, 206 F. Supp. 2d at 1169 (describing a critical habitat as the "principal means for conserving an endangered species").

¹¹¹ Paulson, *supra* note 104, at 555.

¹¹² 16 U.S.C. § 1532(5)(B); see *Conservancy of Sw. Fla.*, 677 F.3d at 1074; *Ctr. for Biological Diversity*, 450 F.3d 939; *Fund for Animals v. Babbitt*, 903 F. Supp. 116.

¹¹³ 16 U.S.C. § 1531(b) ("The purposes of this chapter are to provide . . . a program for the conservation of such endangered species and threatened species . . .").

¹¹⁴ *Middle Rio Grande Conservancy Dist.*, 206 F. Supp. 2d at 1169.

¹¹⁵ See Endangered Species Act of 1973 §§ 2(b), 6–9, 16 U.S.C. §§ 1531(b), 1534–1538 (2006); *Middle Rio Grande Conservancy Dist.*, 206 F. Supp. 2d at 1169.

¹¹⁶ See 16 U.S.C. § 1533(b)(2); Joint Regulations on Endangered Species, 50 C.F.R. § 424.12 (2011).

¹¹⁷ See 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.12.

currently guides agencies can also provide guidance when assigning critical habitat to pre-1978 species.¹¹⁸ Therefore, the solution to this problem is fairly simple; the question of *what* and *how*, to designate is already answered by existing provisions in the ESA and agency regulations, and the question of *whether* can be eliminated by changing “may” to “shall.”¹¹⁹

CONCLUSION

Through the ESA, Congress seeks to protect those species whose continued existence is in serious jeopardy. Five years after its enactment, Congress amended the ESA and strengthened protection for threatened and endangered species by requiring that, at the time of the listing, they be designated a critical habitat. In the decades that the Florida panther has been listed as endangered, it has never been afforded the full range of protection available to those species listed after the 1978 Amendments, and with the current statutory framework, it potentially never will.

The only justification for the Florida panther being treated differently than species listed after 1978 is the chance timing of its listing. The differing treatment defies both logic and Congressional intent and should not be allowed to continue. Therefore, because the courts are powerless to deny this unambiguous statutory provision, Congress should change the statute to require designation of critical habitat for all endangered and threatened species. In that way, the Florida panther, the unarmored threespine stickleback, the grizzly bear, and all other pre-1978 listed species will have the same hopes for recovery and de-listing as the Virginia big-eared bat and all other species listed after 1978.

¹¹⁸ 16 U.S.C. §§ 1533(a)(3)(A)(i), 1533(b)(2); 50 C.F.R. § 424.12.

¹¹⁹ Paulson, *supra* note 104, at 555; *see* 16 U.S.C. §§ 1533(a)(3)(A)(i), 1533(b)(2); 50 C.F.R. § 424.12.